SUPREME COURT, U. S.

In The

APR 30 197

Supreme Court of the United States

October Term, 1974

No. 74-1368

JOSEPH DENTI,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(8316)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Statement 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Essential Facts 3

Reasons For Granting the Writ:

I. Since the police officers observed no crime being committed in their presence and had received no bulletins creating suspicion concerning the vehicle in which petitioner was riding, it was a violation of the Fourth and Fourteenth Amendments of the United States Constitution to have stopped petitioner's vehicle and then conduct a search of his person and the car. No warrant had been issued and consequently the evidence thus obtained should have been suppressed. 8

Contents

Page

II. The Trial Court correctly ruled that petitioner could not be convicted for possession of the single gambling slip found in the rear of the car, but, inexplicably and unconstitutionally, charged that the jurors could nevertheless consider that slip to infer or presume petitioner's knowing possession of the other slips hidden in the front arm-rest of the vehicle.

(A) The presumption of Penal Law Section 225.35(1) is unconstitutional as applied herein.. 17

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Amador-Gonzalez v. United States, 391 F.2d 208 (5 Cir. 1968) 11

Bailey v. Alabama, 219 U.S. 219 18

Baumboy v. United States, 24 F.2d 512 12

Boyd v. United States, 116 U.S. 616 15

Bruton v. United States, 391 U.S. 123 20

Bumper v. North Carolina, 391 U.S. 543 12

Contents

Page

Carroll v. United States, 267 U.S. 132 ..... 10, 11

Chambers v. Maroney, 399 U.S. 42 11

Chapman v. United States, 365 U.S. 610 14

Chimel v. California, 395 U.S. 752 12

Coolidge v. New Hampshire, 403 U.S. 443 ..... 11, 12, 14, 15

Davis v. United States, 382 U.S. 582 11

Frank v. Maryland, 359 U.S. 360 13

Garner v. Louisiana, 368 U.S. 157 21

Green v. United States, 386 F.2d 954 (10 Cir. 1967) 10

Gustafson v. Florida, 414 U.S. 260 ..... 15, 16

Harris v. United States, 390 U.S. 234 11

Hawkins v. Bleakly, 243 U.S. 210 17

Henry v. United States, 361 U.S. 98 13

Howard v. Fleming, 191 U.S. 126 17

James-Dickinson Co. v. Harry, 273 U.S. 119 17

Contents

	Page
Johnson v. United States, 333 U.S. 10	14
Katz v. United States, 389 U.S. 347	11
Manley v. Georgia, 279 U.S. 1	18
Mapp v. Ohio, 367 U.S. 643	13
McDonald v. United States, 335 U.S. 451	14
Mobile, J. & K. C. R. R. Co. v. Turnipseed, 219 U.S. 35	18
Morrison v. California, 291 U.S. 82	18
People v. Denti, 44 App. Div. 2d 44	3
People v. Gazulis, 29 Misc. 2d 939	21
Poldo v. United States, 55 F.2d 866	12
Schneckloth v. Bustamonte, 412 U.S. 218, 36 L. Ed. 2d 854	11
Schmerber v. California, 384 U.S. 757	14
Sibron v. New York, 392 U.S. 40	10
Stanford v. Texas, 379 U.S. 476	13

Contents

	Page
Terry v. Ohio, 392 U.S. 1	10
Thompson v. Louisville, 362 U.S. 199	21
Tot v. United States, 319 U.S. 463	18
United States v. Jeffers, 342 U.S. 48	14
United States v. Lefkowitz, 285 U.S. 452	10
Vale v. Louisiana, 399 U.S. 30	12
United States v. Rabinowitz, 399 U.S. 56	13
United States v. Robinson, 414 U.S. 218	15, 16
Warden v. Hayden, 387 U.S. 294	14
Western & Atl. R. Co. v. Henderson, 279 U.S. 639	18
Wong Sun v. United States, 371 U.S. 471	10, 20
Statutes Cited:	
New York Penal Law:	
Section 225.20	1, 3, 20
Section 225.35	21
Section 225.35(1)	3, 17, 20, 21

Contents

	Page
Section 786-b	21
28 U.S.C. §1257(3)	2
United States Constitution Cited:	
Fourth Amendment	2, 3, 8, 11, 12, 13, 14, 16
Fifth Amendment	2, 3, 22
Fourteenth Amendment	2, 3, 8, 13, 22
Other Authorities Cited:	
Article I, §12 of the New York Constitution	13
Lasson, "The History and Development of the Fourth Amendment to the United States Constitution," 55, the John Hopkins University Studies in Historical and Political Science, 35	13
APPENDIX	
Opinion of Appellate Division	1a
Informal Opinion of Pecora J. Granting Suppression	7a
Certificate Denying Leave	9a
Order of Affirmance on Appeal From Judgment	10a

In The

Supreme Court of the United States

October Term, 1974

No. 74-

JOSEPH DENTI,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

STATEMENT

The petitioner, Joseph Denti, respectfully prays that this Court issue a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review its unanimous affirmance of a judgment of the Supreme Court of the State of New York, County of New York, rendered the 2nd day of July, 1974, convicting the petitioner of the crime of possession of gambling records in the first degree (New York Penal Law, §225.20) and sentencing him up to 3 years imprisonment after trial before Fraiman, J., and a jury. The petitioner is presently incarcerated.

OPINION BELOW

The New York Supreme Court, Appellate Division, First Department, rendered no formal opinion in connection with the affirmance of the judgment of conviction, but did render an opinion located at 44 App. Div. 2d 44, in reversing an order of the Supreme Court, New York County, (Pecora, J.), which had suppressed evidence seized without a warrant. A copy of that opinion is annexed to the petition. In addition, excerpts of the record containing the informal determinations of Judge Pecora are annexed to this petition indicating the basis upon which that jurist suppressed evidence.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The order of the Appellate Division, First Department, affirming the judgment of conviction is dated January 21, 1975. The certificate and order of the Court of Appeals of the State of New York denying leave to appeal is dated the 3rd day of February, 1975. Copies of said orders are annexed to this petition, as is the opinion of the Appellate Division on suppression (44 App. Div. 2d 44).

QUESTIONS PRESENTED

1. Whether the prosecutor's use of evidence obtained as a result of a warrantless search and seizure from the car in which petitioner was riding, violated Denti's rights under the Fourth Amendment and thereby deprived him of a fair trial? (Fourth, Fifth, and Fourteenth Amendments of the United States Constitution)

2. Whether petitioner's rights to a fair trial and due process of law were violated when the Trial Court instructed the jury that it could infer possession of other gambling slips predicated upon the existence of a single slip which it ruled was clearly not attributable to petitioner? Thus was an unconstitutional presumption or inference used against Denti in violation of the Fifth and Fourteenth Amendments?

3. Whether Penal Law Section 225.35(1) creating a presumption of guilty knowledge is constitutional? (Fifth and Fourteenth Amendments)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Fourteenth Amendments of the United States Constitution are involved herein, as are Sections 225.20 and 225.35(1) of the Penal Law of the State of New York.

ESSENTIAL FACTS

There was a suppression hearing and also a trial. As we have already indicated, the suppression hearing resulted in a determination by Justice Pecora that the evidence seized should be suppressed. That determination was overturned in the Supreme Court, Appellate Division, First Department, in *People v. Denti*, 44 App. Div. 2d 44. Subsequently there was a trial and the trial resulted in a conviction of Denti.

That determination was appealed to the Appellate Division of the Supreme Court, First Department, and by an order dated

the 21st day of January, 1975, the judgment of conviction for possession of gambling records in the first degree was affirmed without opinion.

An application for leave to appeal to the Court of Appeals of the State of New York was denied by order of Honorable Jacob D. Fuchsberg on February 3, 1975.

The facts adduced at the suppression hearing and at the trial are rather similar. We shall therefore review the testimony at the trial with the submission that the testimony was very similar on both occasions.

Patrolman or Police Officer William Schactel testified that on April 24, 1972, he and two other officers (Shanahan and Mednick) were on a narcotics stakeout when they observed the same car pass their own parked car several times.

Schactel recalled that he and his fellow officers then followed this car, noticed that it parked, and saw its two occupants, both Latins, (Ruiz and Rodriguez), enter the rear of another vehicle which had pulled alongside. The front seat of the other vehicle was occupied by petitioner and one Sarcinella. Petitioner was driving.

It is important for this Court to note that the police officers observed no traffic violations and perceived no crime being committed in their presence.

Apparently, just on the basis of general suspicion, the officers approached Denti's car and requested his license and

registration, neither of which petitioner had in his possession. He informed the officers, however, that the car belonged to his wife, and this fact was later established to be true. No bulletin, no police communication, or other information was ever transferred to the officers to cause them to be suspicious of this car, that is, the car in which the foursome were now driving.

While requesting the license and registration, however, Police Officer Schactel declared that he spied a "pile" of money ($9,095, People's Exhibit 1) on the front seat between Sarcinella and Denti.

The officer later conducted a thorough search of the vehicle. It is uncontested that there was no search warrant for this search. The occupants of the vehicle denied knowledge of or possession of the money.

The occupants were then taken into police custody and were driven to the stationhouse. Ruiz and Rodriguez were now put in the front seat with Patrolman Mednick while Sarcinella and Denti were put in the back seat, that having been the former location of Ruiz and Rodriguez.

At the police station, one of the officers found a "gambling" slip on the rear floor (People's Exhibit 3). A search was then conducted under the front seat arm-rest and 30 more slips, that is gambling slips, were discovered, consisting of a group of 12 and a group of 18, marked respectively People's Exhibits 2A and 2B.

The officers placed all four men under arrest (TT68-79, 85, 93, 97).[1]

It is important to note that the petitioner was never found in possession of any gambling slips or money (TT116).

There was no test for fingerprints (TT146, 151).

On instructions of Assistant District Attorney Goldstock, the charges against Ruiz and Rodriguez were dropped (TT125-126).

Patrolmen Shanahan and Mednick testified substantially the same as Police Officer Schactel. Shanahan and Mednick, however, both testified that Denti was outside the car while the money was being counted whereas the other three occupants were still inside the vehicle at this time (TT201, 216-217)

The officers stated that they just glanced periodically at the occupants of the car at this time (TT239).

Thirty-five hundred dollars ($3,500) was found in the possession of Sarcinella (TT102).

No handwriting analyses were made of the slips in question (TT298).

The Trial Court granted Sarcinella's motion to dismiss and only Denti was convicted (TT203-233).

1. Numerals in parentheses preceded by the prefix "TT" refer to the trial transcript.

It is interesting to note that both Sarcinella and Denti were in the same *locus standi* except for the fact that petitioner was the driver and husband of the owner of the vehicle (TT326-329, 330-333).

It is also the law of the case, since it was so charged by the Trial Court, that as a matter of law the jury could not find appellant guilty of possession of People's Exhibit 3 (the slip found on the floor of the back seat of the car), but that it could use People's Exhibit 3 to infer Denti's possession of the 30 other slips found in the car (TT393-397).

It is submitted that this is a very inconsistent and incorrect instruction since if the single slip in question, that is, People's Exhibit 3, could not be attributed to Denti, how then could a presumption or inference be drawn that because of the existence of that single slip, the trial jurors could infer that he possessed People's Exhibits 2A and 2B. We submit that this violated Denti's rights under the due process clause by depriving him of a fair trial and by permitting an unconstitutional inference to be drawn against him.

A proper objection was preserved to the charge (TT406-407).

REASONS FOR GRANTING THE WRIT

I.

Since the police officers observed no crime being committed in their presence and had received no bulletins creating suspicion concerning the vehicle in which petitioner was riding, it was a violation of the Fourth and Fourteenth Amendments of the United States Constitution to have stopped petitioner's vehicle and then conduct a search of his person and the car. No warrant had been issued and consequently the evidence thus obtained should have been suppressed.

The facts are substantially conceded. Police officers who were on a narcotics stakeout noticed two Latins in an automobile driving around the block several times. The officers followed it and after a while, another car being driven by petitioner, pulled up alongside of the vehicle in which Ruiz and Rodriguez (the Latins) had been riding, and the Latins then entered the rear of petitioner's vehicle. Petitioner's vehicle had not done anything suspicious.

The officers saw no violations of law being committed in their presence and had received no bulletins whatsoever from the Police Department or anywhere else that would have aroused their suspicions.

Launching an exploratory investigation based upon a hunch or otherwise, the police officers arrogated to themselves the right to stop petitioner's vehicle and demand that he produce his license and registration. The petitioner was unable to

accommodate the officers, as a result of which he was searched but no gambling slips or other incriminating evidence was found on his person. The vehicle was impounded for all intents and purposes, and the petitioner and the occupants thereof were taken to the local police station.

After alighting from the car, another search of the vehicle itself was conducted, at which time an alleged gambling slip (People's Exhibit 3) was found on the floor of the back of the automobile. A search was then conducted under the front seat arm-rest where 30 additional gambling slips were also discovered.

We emphasize that nothing whatsoever incriminating was found on the person of Denti.

All four individuals were placed under arrest predicated upon this evidence. The prosecutor subsequently, on his own motion, dismissed the charges against Ruiz and Rodriguez. The Trial Judge dismissed the charges against Sarcinella.

Only Denti remained in the case since he was the husband of the registered owner of the vehicle and had been driving it.

Predicated upon the search and seizure, Denti was convicted.

A Court is required to assess the reasonableness of any officer's conduct in connection with a warrantless search and must rule upon the governmental interest to justify official intrustion upon any constitutionally protected interests of the individual.

Since there is no rule of thumb or test to determine reasonableness, other than by balancing the need to search, against the invasion of constitutional rights which ensues, the Court must then weigh the motives of police officers and the rights of the private citizen. When any challenge is made to the motive or justification, a police officer is then required to establish with specificity, the facts, inferences, and rationale which may reasonably justify his action.

Simple good faith on the part of the arresting officer is never enough, and it is an imperative that in making the assessment of reasonableness, the facts available to the police officer at the precise moment of the arrest and seizure, actually establish that probable cause in fact existed. (*Terry v. Ohio*, 392 U.S. 1; *Sibron v. New York*, 392 U.S. 40; *United States v. Lefkowitz*, 285 U.S. 452; and, *Wong Sun v. United States*, 371 U.S. 471.)

The defendants at the trial and petitioner herein, were lawfully using the highways and were not committing any crimes. (*Carroll v. United States*, 267 U.S. 132, 153.)

It has also been held that where officers stop a vehicle upon a pretext merely to conduct a search, the evidence thus obtained by such improper motivations require suppression. For example, detaining a defendant on a vagrancy charge as a ruse to later arrest him on a more serious charge, following a warrantless search and seizure, resulted in a suppression of that evidence. (*Green v. United States*, 386 F.2d 954 (10 Cir. 1967).)

Wherever an arrest is a mere pretext for an otherwise legitimate search, the evidence still must be suppressed. (*Amador-Gonzalez v. United States*, 391 F.2d 208 (5 Cir. 1968).)

We must bear in mind that in the case at bar, there was no probable cause to stop the vehicle or to make an arrest. Moreover, there was no *probable cause* to believe that the vehicle contained contraband. (*Chambers v. Maroney*, 399 U.S. 42, and *Carroll v. United States*, 267 U.S. 132.)

It must be recognized further that it was only *after* the vehicle in question was unlawfully halted and the occupants taken to a police station that the alleged single gambling slip on the back floor of the car was found. Had the car not been stopped at all, obviously the officers would never have found the slips. (*Harris v. United States*, 390 U.S. 234.)

It is elementary that all searches are presumptively invalid without a search warrant unless the search comes within one of the recognized exceptions to the Fourth Amendment. (*Katz v. United States*, 389 U.S. 347, 357; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455; and *Chambers v. Maroney*, 399 U.S. at 51, *supra*.)

Moreover, there is no allegation in this case that any consent was obtained from the victims of the search, namely petitioner Denti, or anyone else. (*Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854; *Davis v. United States*, 382 U.S. 582, 593-594.)

It has also been held that an arrest or search can never be validated retrospectively by what a warrantless search discloses. (*Bumper v. North Carolina*, 391 U.S. 543, 548, n. 10.)

Neither the doctrine of *Chimel v. California*, 395 U.S. 752, nor that of *Coolidge v. New Hampshire*, *supra*, are of any help to the prosecution in the case at bar since there was no basis for stopping the vehicle in the first place. The most that could have been done was to search the people for a weapon. The occupants, however, were already out of the car when the evidence was discovered.

Suspicion alone is never enough to warrant an arrest. (*Baumboy v. United States*, 24 F.2d 512 and *Poldo v. United States*, 55 F.2d 866, 869.)

In *Vale v. Louisiana*, 399 U.S. 30, this Court held that where a warrantless search is conducted, the burden rests on the Government or prosecution to prove that exceptional circumstances permitted the search and seizure under an exception to the rigid requirements of the Fourth Amendment. In the case at bar, there was no proof whatsoever that the police officers had any probable cause at all to stop the vehicle in question or to make an arrest.

We submit that the opinion of the Supreme Court, Appellate Division, First Department, at 44 App. Div. 2d 44, is not cogent and does not justify the activities of the police officers herein. We commend a reading of that decision to this Court for analysis which we believe will substantiate the position taken by the petitioner herein (annexed is a copy of the opinion).

In *Henry v. United States,* 361 U.S. 98, which also involved a car, this Court declared that the evidence was insufficient to have warranted an arrest because the officers had no more than mere suspicion. (This Court has discussed the important history of the Fourth Amendment in such cases as *Stanford v. Texas,* 379 U.S. 476, 481-485; and *Frank v. Maryland,* 359 U.S. 360, 363-365. Generally, Lasson, *"The History and Development of the Fourth Amendment to the United States Constitution,"* 55, the John Hopkins University Studies in Historical and Political Science, 35, 36, also contain ample background substantiating the petitioner's position herein.)

The Fourth Amendment's protections are enforceable against the states by virtue of the due process clause of the Fourteenth Amendment. (*Mapp v. Ohio,* 367 U.S. 643, 655.) Article I, §12 of the New York Constitution, similar to the Fourth Amendment, provides:

> ". . . the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

We submit that the dissenting opinion of Justice Frankfurter in *United States v. Rabinowitz,* 399 U.S. 56, 83, cogently sums up the activities of the officers herein and demonstrates that they acted unreasonably. In *Rabinowitz, supra,* Justice Frankfurter explained:

> "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police [for a court] to say that an 'unreasonable search' is forbidden — that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: The history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response."

To demonstrate that the officers were not justified in stopping the vehicle or conducting a search, we need only look at the cases decided in this Court for substantiation. They were not responding to an emergency. (*United States v. Jeffers*, 342 U.S. 48, 51, 52; *McDonald v. United States*, 335 U.S. 451, 454.) They certainly were not in hot pursuit of a fleeing felon (*Warden v. Hayden*, 387 U.S. 294, 298-299; *Chapman v. United States*, 365 U.S. 610, 615; *Johnson v. United States*, 333 U.S. 10). The gambling slips which were ultimately seized were not in the process of being destroyed (*Schmerber v. California*, 384 U.S. 757, 770-771); *United States v. Jeffers, supra).* Nor were they about to be removed from the jurisdiction (*Chapman v. United States, supra; Johnson v. United States, supra*). The existence of the slips were unknown until discovered.

The "plain view doctrine" of *Coolidge v. New Hampshire, supra,* is no justification since it was only after the vehicle was improperly stopped and the occupants placed under arrest and removed from the car, that the gambling slip in question was

finally noticed on the floor of the back of the car. Until the slip itself was examined, moreover, there was no evidence that the police even knew it was a gambling slip.

We must bear in mind that this was not a situation where there was some gun or some other obvious type of contraband. A piece of paper *per se* is not contraband and is not incriminating until it is thoroughly examined.

As a matter of fact, in *Coolidge v. New Hampshire,* this Court aptly explained, quoting with approval the language of *Boyd v. United States,* 116 U.S. 616, 635:

> "'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches, and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'"

We turn now to a brief discussion of *United States v. Robinson,* 414 U.S. 218, and *Gustafson v. Florida,* 414 U.S. 260.

In both of those cases, the police had a lawful right to stop the vehicle in question. In *Robinson*, 414 U.S. at 221, this Court observed, in footnote 1:

> "We think it is sufficient for purposes of our decision that respondent was lawfully arrested for an offense and that Jenks' placing him in custody following that arrest was not a departure from established police department practice. . . . *We leave for another day questions which would arise on facts different from these.*"

We interpret that footnote to mean that any departure from the particular fact pattern of *Robinson* might not be decided the same way by this Court. Indeed, *if the arrest were a pretext rather than a lawful one, we submit that it is implicit in both* Robinson *and* Gustafson *that this Court would not have tolerated the activities of the police.*

Moreover, it must be borne in mind that both *Robinson* and *Gustafson*, even upon the limited facts upon which they rested, tolerated only a search of the person and not of the vehicle itself.

To uphold the conviction and the activities of the police in the case at bar is to make a mockery of the Fourth Amendment completely. We think the reliance of the prosecution in the courts below placed upon *Gustafson* and *Robinson*, are incorrect. We think this Court should clarify this aspect so that similar trespasses will not occur.

Again we remind this Court that nothing incriminating whatsoever was found on the person of the petitioner herein.

Thus, the petition for certiorari herein should be granted and the judgment of the New York courts vacated. The evidence should be ordered suppressed and the petitioner discharged from custody.[2]

II.

The Trial Court correctly ruled that petitioner could not be convicted for possession of the single gambling slip found in the rear of the car, but, inexplicably and unconstitutionally, charged that the jurors could nevertheless consider that slip to infer or presume petitioner's knowing possession of the other slips hidden in the front arm-rest of the vehicle.

(A) The presumption of Penal Law Section 225.35(1) is unconstitutional as applied herein.

We recognize that the establishment of presumptions and rules respecting the burden of proof is clearly within the domain of state governments. *(Hawkins v. Bleakly,* 243 U.S. 210, 214; *James-Dickinson Co. v. Harry,* 273 U.S. 119, 124; and, *Howard v. Fleming,* 191 U.S. 126, 136.)

As long as a presumption is not unreasonable and is not conclusive of the rights of the person against whom raised, it does not violate the due process clause. Legislative fiat may not

2. We ask this Court to note that there is no statutory presumption in New York that money or slips of paper found in a car are presumed to be the property of the person driving the car.

take the place of fact however, in the determination of issues involving life, liberty, or property, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense, is void. *(Manley v. Georgia,* 279 U.S. 1, 5; *Western & Atl. R. Co. v. Henderson,* 279 U.S. 639, 642; *Bailey v. Alabama,* 219 U.S. 219, 233; and, *Mobile, J. & K. C. R. R. Co. v. Turnipseed,* 219 U.S. 35, 42.)

For example, a presumption that a firearm or ammunition in the possession of a person convicted of a crime of violence was automatically transported or received in violation of the law, was held invalid because there was no rational connection between the facts proved and that presumed. *(Tot v. United States,* 319 U.S. 463.)

Where the connection between the fact proven and that presumed is not sufficient and the reasoning does not lead from one to the other, statutory presumptions will be deemed void. *(Manley v. Georgia,* 279 U.S. 1, 5; *Western & Atl. R. Co. v. Henderson, supra; Mobile, J. & K. C. R. R. Co. v. Turnipseed, supra; Bailey v. Alabama, supra.)*

As was said in *Morrison v. California,* 291 U.S. 82, at 88-89:

> "The limits are in substance these, that the State shall have proved enough to make it just for the defendant to be required to repel what has been proved . . . or at least that upon a balancing of convenience or of the opportunites for knowledge

> the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

In the case at bar, the petitioner was conclusively declared to be innocent of possession of the single slip found on the floor of the rear of the car. In other words, the Trial Court correctly instructed the jury that they could not possibly consider convicting Denti of possession of that gambling slip.

Denti was not found in possession of anything incriminating whatsoever. There was no evidence whatsoever that he knew, or was aware of the existence of any policy slips inside the arm-rest of the front seat of the car. The fact that the car belonged to his wife and that he was driving it, does not raise a presumption under the New York Penal Law or any other New York statute, that Denti knowlingly possessed the gambling slips. They could have belonged to the others in the car, or even to his wife.

Sarcinella, who received a dismissal of the charges against him by the Trial Judge, and Ruiz and Rodriguez, whose cases were dismissed on motion of the District Attorney, had as much to do with the alleged offense as the petitioner. There was just no rational basis to infer, or to permit the jury to infer, that Denti knew of the existence of the slips hidden in the front seat of the car merely because of the fact that a policy slip was found on the floor of the rear of the automobile.

It was wholly inconsistent for the Court to declare to the jury that while it could not consider the single slip, it could

nevertheless use that slip for the purpose of inferring that Denti in fact knew of the existence of the other slips. We are hard-pressed to understand what the Court was talking about and we are sure that the jury was completely confused. This was something in the nature of a "Chinese jigsaw puzzle" *(Wong Sun v. United States, supra).* The Court, in effect, was asking the jury to perform a mental gymnastic which no one could be expected to perform. *(Bruton v. United States,* 391 U.S. 123.)

Penal Law Section 225.35(1) reads as follows in pertinent part:

> "Proof of possession of any gambling . . . record specified in Section . . . 225.20, is presumptive evidence of possession thereof with knowledge of its character."

In the first place, it is obvious that Denti was not proved to have possessed any gambling record.

At page 399 of the trial transcript, the Trial Court told the jury it had a right to consider whether or not petitioner "possessed" Exhibits 2A and 2B on the date in question. Those were the other slips that were found following the discovery of the single slip in the back of the car. There was absolutely no evidence upon which the jury could make such an inference. The other three occupants of the car were acquitted or dismissed, either on motion of the District Attorney or by ruling of the Trial Court. There was a complete dearth of evidence connecting the petitioner with the possession of any slips in the car whatsoever. Certainly no more connection than any of the other occupants thereof.

If the petitioner had possessed one of the slips in his pocket, then of course we could understand the Court seeking to relate that to other slips. But the Court itself recognized that the petitioner possessed nothing incriminating whatsoever. The single slip could *not* be imputed to Denti.

Under the circumstances, it was highly improper and unconstitutional in violation of the due process clause to permit the jury to speculate, on no evidence whatsover, that the petitioner possessed any of the slips found on the front seat of the car (Exhibits 2A and 2B).

The statutory presumption, Section 225.35(1), should not have been invoked at all since there was no evidence that petitioner ever possessed any gambling records. Nonetheless the jury was told that "proof of possession" gave the jury the right to presume that the possession thereof was with knowledge of its character. What proof of possession? It was non-existent *(Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157).

The presumption created by the statute itself, we maintain is unconstitutional. We refer this Court to the rather well-reasoned opinion in *People v. Gazulis,* 29 Misc. 2d 939, which interpreted the predecessor Section 986-b. Since the source of Section 225.35 is Section 986-b, the opinion is very apt.

But, irrespective of any other consideration, we maintain that as applied in the case at bar, the presumption was wholly unwarranted since there was no evidence that petitioner ever possessed anything incriminating. Moreover, if he could not be

charged with knowledge or possession of the single policy slip found in the back of the car, and that policy slip was the incentive to search the rest of the car, it appears obvious that it was wholly improper for the Trial Judge to instruct that despite Denti's complete innocence of possession of the single slip found in the back of the vehicle, the jury could still use that slip to infer his guilty possession of the slips hidden in the front seat of the vehicle. The rationale of the Court seems to be a clearly unconstitutional and improper inference based upon an unfounded inference. The charge of the Court therefore deprived the petitioner of a fair trial and thus violated the due process clauses of the Fifth and Fourteenth Amendments.

Accordingly, for this reason, too, the petition for certiorari should be granted and the judgments of the state court reversed, and the indictment dismissed.

CONCLUSION

The petition for certiorari should be granted, and upon granting said petition the judgment of the state court convicting petitioner of possession of gambling records should be reversed and the indictment ordered dismissed.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

OPINION OF APPELLATE DIVISION

44 APPELLATE DIVISION REPORTS, 2d SERIES

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant

v.

JOSEPH DENTI and JOSEPH SARCINELLA,

Respondents.

First Department, March 12, 1974; resettled April 11, 1974.

* * *

LANE, J. The defendants were indicted for the crime of possession of gambling records in the first degree. The defendants moved prior to trial to suppress gambling records and a quantity of United States currency. This appeal is being prosecuted by the People after the Trial Justice granted the motion to suppress.

Patrolmen Schachtel, Shanahan and Mednick were in an unmarked car, maintaining surveillance on 166th Street in Manhattan in connection with possible narcotics offenses. They observed a car with two occupants (later identified as Messrs.

Ruiz and Rodriguez) driving past their location at frequent intervals. They decided to follow it and ended up driving in circles always passing the initial 166th Street location. The car finally parked and another car occupied by the two defendants pulled up alongside. Ruiz and Rodriguez entered the defendants' car. All four then drove away, followed by the police. The defendants' car was driven "erratically," with no real destination. They just drove around "in circles" until after approximately 10 minutes of driving they returned to 166th Street. The three officers then approached the car which was being driven by defendant Denti, and Patrolman Schachtel asked for Denti's license and registration. Denti did not have either and he explained that the car was owned by his wife. At this point Schachtel observed a three-inch stack of money on the front seat with newspaper around the sides. The money which was counted at the scene amounted to $9,095 in various denominations. The occupants denied any knowledge of ownership of this money. All four denied knowledge of who the owner of the first car was, as well.

At this point all four car occupants were directed to leave the car and subjected to a superficial weapons search. The four consented to go to the stationhouse for questioning and were driven in Denti's wife's car by the police to the stationhouse. As they left the car to enter the stationhouse, Patrolman Schachtel, who was sitting in the back seat during the trip to the stationhouse, noticed a piece of paper lying face up and from the visible writing recognized it to be a gambling record known as a "pay and collect slip." The dollar amount recorded on the slip added up to a total of $9,095, which corresponded exactly to the

amount of money found on the front seat. All four men were then placed under arrest for possession of gambling records. The charges against Ruiz and Rodriguez were subsequently dropped. A further search of the vehicle revealed additional slips representing another $57,000 in wagers. Subsequent to the arrest, additional money was found on the person of defendant Sarcinella.

The only testimony at the hearing was that of Patrolman Schachtel. Though the Trial Justice gave full credence to the narrative of the patrolman, he nevertheless granted the motion to suppress stating that the arrest was based on "pure suspicion."

A step-by-step reconstruction of the occurrence reveals that the ultimate arrest was not based on a mere suspicion or conjecture but on probable cause.

The police officers, trained to detect and, if possible, anticipate criminal activity, observed the unusual habits of the defendants and determined that they warranted scrutiny. The activities of the defendants Denti and Sarcinella cruising in circles in a high-crime area indicated a possibility that a crime was being or about to be committed. Of course, at that time they had only a mere suspicion or hunch that any wrongdoing was involved and thus had no right to make any arrest. (cf. *People v. Arthurs*, 24 NY 2d 688, 692).

However, the next step taken by the police was perfectly legitimate, and in conformity with the normal police duty to know what is going on in the streets; namely, checking for the

registration of the vehicle and the license of the driver of that vehicle (Vehicle and Traffic Law, §401, subd. 4; §501, subd. 4; *People v. Rowell*, 27 NY 2d 691; *People v. Battle*, 12 NY 2d 866; cf. *People v. Amanatides*, 39 AD 2d 1010).

Once it was established that the driver had neither license nor registration, the police had a right to take them to the stationhouse for questioning (Vehicle and Traffic Law, §423, subd. 1), especially when coupled with the "highly suggestive" answers given by the defendants in disclaiming ownership of the pile of money (cf. *People v. Rosemond*, 26 NY 2d 101, 105).

Until this point, no arrest had taken place. Defendants had freely consented to go to the stationhouse.

The next significant occurrence was when Patrolman Schachtel, while getting out of the car at the stationhouse, saw the "pay and collect slip" on the floor in the back of the car. It appeared to him to be a gambling paper and his taking it was not a wrongful seizure since this contraband was in plain view of the police officer (*Harris v. United States*, 390 U.S. 234; *People v. Battle*, 12 NY 2d 866; cf. *People v. Gallmon*, 19 NY 2d 389).

The subsequent search of the automobile and recovery of additional policy slips, made in a timely, undelayed fashion, immediately after and related to the arrest, rendered seizure of those items of contraband proper (*Cooper v. California*, 386 U.S. 58; *People v. Brosnan*, 32 NY 2d 254, 260-261; *People v. Montgomery*, 15 NY 2d 732, cert. den. 382 U.S. 853; cf. *Preston v. United States*, 376 U.S. 364; *People v. Lewis*, 26 NY 2d 547, 552).

Opinion of Appellate Division

The search of the person of Sarcinella after the arrest was made was a reasonable incident to the arrest itself.

Analysis of the police activity in the case at bar exemplifies legal and proper police work resulting in an arrest based on probable cause.

In sum, determination of probable cause deals not with technicalities but with probabilities which must perforce include the practical and factual considerations of everyday life acted upon by reasonable and prudent men under the totality of the circumstances presented *(Brinegar v. United States,* 338 U.S. 160, 175).

It must further be noted that the determination at the hearing omitted any findings of fact and, upon request for such findings, the court merely stated that "the entire transcript is clear as to exactly why I made my decision." Such a statement is not in compliance with the mandate of subdivision 6 of CPL 710.60. However, since the defendants had a full and fair hearing, the findings of fact and conclusions of law as made by this court shall constitute the findings and conclusions which should have been made by the hearing Justice (cf. *People v. Brady,* 16 NY 2d 186, 189).

Accordingly, the order, Supreme Court, New York County (PECORA, J.), dated July 27, 1973, granting defendants' motion to suppress should be reversed, on the law, and the motion denied.

Opinion of Appellate Division

NUNEZ, J.P., KUPFERMAN, MURPHY and TILZER, JJ., concur.

Order, Supreme Court, New York County, entered on July 27, 1973, unanimously reversed, on the law, and the motion denied.

INFORMAL OPINION OF PECORA J. GRANTING SUPPRESSION

* * *

During colloquy with counsel, the Court did express the following informal opinions (Francis Pecora, J.):

> "They had no information, the police, this case is silent as to whether or not they had any reason to believe this was a stolen car. The very worst, the very worst they could think about this driver is that this was a perhaps improperly registered car, and in the normal course of events, the driver of such a car is given a ticket and a presumption is created that it is such a type of car, and when he goes into court with his registration, the case is thrown out . . . [97]
>
> All they do is call back to the police station and in five minutes they get an answer to ascertain whether or not a car has been stolen. [101]
>
> They were looking for a parking spot. [95]
>
> When these police officers walked over to this car and they asked the driver for his license and registration, and once that was produced, that — I refuse even to characterize it as a crime, that failure to produce that item whatever it was, whatever kind of violation it was, the fruits of

that crime lay right there and a search would not have helped in any way to convict them or make them more guilty of that crime. [108]

Now, the only thing you have here is a police officer who claims that he looks down and he sees a pile of money lying in newspaper . . . And this is the reason why now he makes people get out of the car because he claims that nobody would say this money belongs to me; isn't that what you have here? [109]

People going around a block, does that mean that you should have a suspicion that these people are necessarily committing a crime? Here you have police officers staked out on narcotics, on narcotics, and the charge in this case is gambling, or the proceeds of gambling, is it so?" [110]

CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH DENTI

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
February 3, 1975

s/ Jacob D. Fuchsberg
Associate Judge

* Description of Order:

Order of Appellate Division, First Department, appearing in the New York Law Journal on January 22, 1975, affirming without opinion, conviction of possession of gambling records in the first degree.

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

1634

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 21, 1975.

Present—Hon. Theodore R. Kupferman, Justice Presiding
Francis T. Murphy, Jr.
George Tilzer
Myles J. Lane, Justices.

The People of the State of New York,

Respondent,

-against-

Joseph Denti,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Fraiman, J.) rendered on July 2, 1974, convicting him of the crime of possession of gambling records, and said appeal having been argued by Mr. Gilbert S. Rosenthal of counsel for the appellant, and by Mr. Jonathan Lovett of

Order of Affirmance On Appeal from Judgment

counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Criminal Term, Supreme Court, New York County, for proceedings to direct defendant to surrender himself to said Court in order that execution of the judgment be commenced or resumed (CPL §460.50, subd. 5).

Counsel for appellant is referred to §606.5(2), Rules of the Appellate Division, First Department.

ENTER:

HYMAN W. GAMSO
Clerk.